STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT ARBUCKLE, Personal Representative of the Estate of CLIFTON M. ARBUCKLE,

Appellee,

v.

GENERAL MOTORS LLC,

Appellant.

Supreme Court No. 151277
Court of Appeals No. 310611

MCAC LC No. 11-000043

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REPLY IN SUPPORT OF APPELLANT GENERAL MOTORS LLC'S APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

Arbuckle's Response conspicuously fails to address the myriad errors made by the Court of Appeals that should compel this Court to grant GM's Application. Nothing in Arbuckle's Response changes the fact that the Court of Appeals simply got it wrong. In fact, Arbuckle's Response reinforces why the issues in this case rise to the level of significance appropriate for adjudication by this Court.

According to the Court of Appeals: (1) unions lack the power to bind their retirees during collective bargaining negotiations with respect to **non-vested** benefits, absent express individual consent from each retiree; (2) ordinary principles of contract interpretation, somehow, do not apply to collective bargaining agreements; and (3) state courts and administrative agencies have subject matter jurisdiction to adjudicate actions predicated on breaches of collective bargaining agreements. Arbuckle wholeheartedly embraces this flawed reasoning of the Court of Appeals, which disregards the record evidence, runs counter to Michigan law and creates perpetual rights where none exist, and tries to "explain away" (often in footnotes) the Court of Appeals' patent mistakes.

If allowed to stand, the Court of Appeals' Opinion subjects every employer with a unionized workforce, as well as union members and retirees, to the specter of uncertainty as to the validity of currently negotiated collective bargaining agreements (which may include enhancements to retiree benefits) and jeopardizes the fundamental relationship between unions and their retirees on the one hand and unions and employers on the other. The deleterious impact of the Court of Appeals' Opinion is particularly pronounced in Michigan because Michigan has one of the largest percentages of current union members and retirees in the nation.

Amicus Curiae briefs submitted on behalf of the Michigan Manufacturers Association and the Michigan Self-Insurers' Association highlight further the gravity of the issues raised in GM's Application. While this case began as a non-descript workers' compensation matter, through the clear error of the Court of Appeals' it has morphed into something far more significant and rife with unintended consequences. To prevent material injustice to GM in the instant action and more generally to all other unionized employers, workers and retirees in the State, this Court should peremptorily reverse and vacate the Court of Appeals' Opinion or, in the alternative, grant GM's Application.

ARGUMENTS

I. Pursuant to the Clear and Unambiguous Language of MCL 418.354, Coordination of Arbuckle's Workers' Compensation Benefits is Mandatory by Default – Arbuckle's Interpretation of the Statute Based Upon its Purported "Legislative History" is Irrelevant.

No matter how strenuously Arbuckle argues to the contrary, by default coordination of workers' compensation benefits with employer funded retiree disability benefits, absent certain limited circumstances not present here, is mandatory. *See* MCL 418.354(1) (stating "[e]xcept as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits . . . **shall** be reduced . . ."). [1] Because the language of MCL 418.354 is clear and unambiguous, Arbuckle's self-serving endeavor to delve into purported "legislative intent" of MCL 418.354, which includes references to newspaper articles replete with inadmissible hearsay, is wholly irrelevant to the disposition of this case. *See* Arbuckle's Response, at pp. 15 and 20-22 and Exhibit 4. This is particularly true when Arbuckle does not argue that the statute is ambiguous.

[1] Emphasis added and internal citations, quotations, original emphasis and punctuation omitted unless otherwise noted.

In Michigan, it is axiomatic that:

> When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed."

GC Timmis & Co v Guardian Alarm Co, 468 Mich 416, 420; 662 NW 2d 710 (2003); *Mayor of City of Lansing v Michigan Public Service Com'n*, 470 Mich 154, 164, 680 NW2d 840 (2004). Consequently, the Court does not need to look beyond the unequivocal words of the statute to determine that coordination is mandatory by default. Such an interpretation is wholly consistent with *Smitter v Thornapple Twp*, 494 Mich 121, 126; 833 NW 2d 875 (2013), in which this Court held "that coordination of benefits is **mandatory** . . . ."[2]

The fact that Magistrate Lengauer determined the baseline amount of Arbuckle's workers' compensation benefit in 1995 **does not**, as Arbuckle's contends, preclude coordination. *See* Arbuckle's Response, at pp. 8 and 19.[3] Pursuant to MCL 418.354(8), Magistrate Lengauer **had to make his initial determination** to establish the foundation from which coordination would occur. *See* MCL 418.354(8).[4] Magistrate Lengauer's determination does not (and cannot) render Arbuckle's workers' compensation benefit immune from compulsory coordination. MCL 418.354(10) does not, as Arbuckle asserts, shift the burden to the employer to prove the ability to

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[2] "The coordination of benefits is mandatory, not discretionary, and reduces an employer's obligation to pay weekly wage loss benefits as a matter of law." *Smitter*, *supra*, at 138. Similarly, *Tyler v Livonia Public Schools*, 459 Mich 382 (1999), which Arbuckle cites in his Response, supports the concept that coordination of benefits is mandatory by default.

[3] Arbuckle's Response cites no authority for the proposition that Magistrate's Lengauer's determination of his workers' compensation benefits is exempt from coordination. It is firmly-established that Arbuckle cannot simply announce a position and leave it to this Court to discover and rationalize the basis for his claim. *See Mitcham v City of Detroit*, 355 Mich 182, 203 (1959).

[4] "Except as provided in subsections (4), (5), and 6, a credit or reduction of benefits otherwise payable . . . **shall not be taken . . . until there has been a determination of the benefit amount otherwise payable to the employee** . . ." MCL 418.354(8)

coordinate. *See* Arbuckle's Response, at pp. 4. Instead, MCL 418.354(10) merely requires the coordinating employer to provide (for informational purposes) the basis of its coordination calculation to the Workers' Compensation Agency. *See* MCL 418.354(10); *Franks v White Pine Copper Div, Copper Range Co*, 422 Mich 636, 664; 375 NW2d 175 (1985), overruled on other grounds ("We hold that an employer is not required to petition and prevail at an evidentiary hearing before it is entitled to coordinate . . ., but that, instead, the reporting and informational provisions of §354(10) and the employee's right to seek a hearing in the event of dispute will govern.").

II. GM and the UAW May Negotiate Changes to Non-Vested Contractual Retiree Benefits Such as Those Set Forth in the 1990 Letter of Agreement.

GM did not have to proffer any evidence that Arbuckle affirmatively assented to the coordination of his workers' compensation benefits (*i.e.* the 2009 Letter of Agreement). *See* Arbuckle's Response, at pp. 14 and 24. The Court of Appeals committed clear reversible error when it ruled that a change in **non-vested** contractual retiree benefits required Arbuckle's specific approval. *See* Court of Appeals Opinion, at p. 6, GM's Application, Exhibit 1. Plainly, both the Court of Appeals and Arbuckle fail to understand the significance of and dispositive difference between vested and non-vested retiree benefits.

Although retirees are no longer members of an active collective bargaining unit, unions unquestionably have the power to bind their retirees during collective bargaining negotiations with respect to **non-vested** retiree benefits. *See Allied Chemical & Alkali Workers, Local 1* v *Pittsburgh Plate Glass Co*, 404 US 157, 171 n 11 and 181 n 20, 92 S Ct 383, 30 L Ed 2d 341 (1971); *Williams v WCI Steel Co, Inc*, 170 F 3d 598, 605 (CA 6 1999); *Toensing v EA Brown*, 528 F 2d 69, 72 (CA 9 1975); *Sparks v Ryerson & Haynes, Inc*, 638 F Supp 56, 60 (ED Mich 1986); *Garbinski v GM*, 2012 WL 1079924, *2 (ED Mich 2012) (unpublished) ("*Garbinski I*"),

GM's Application, Exhibit 9; *Garbinski v GM*, 521 Fed Appx 549 (CA 6 2013) (unpublished) ("*Garbinski* II), GM's Application, Exhibit 11. Whether retiree benefits are "vested depends on the intent of the parties." *Garbinski* I, *supra*, at *3.

Importantly:

> **[b]ecause vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest must be found in the plan documents and must be stated in clear and express language.**

See M&G Polymers USA, LLC v Tackett, 135 S Ct 926, 937 (2015). Courts interpret collective bargaining agreements, such as the 1990 CBA, utilizing fundamental principles of contract law. *See Id., at*, 933. When the terms of a collective bargaining agreement "are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *Id*.

Arbuckle's (and the Court of Appeals') invalid belief that the 1990 Letter of Agreement grants him a perpetual vested right against the coordination of his workers' compensation benefits is simply wrong. Importantly, the 1990 Letter of Agreement contains explicit durational language demonstrating that neither the UAW nor GM intended to vest Arbuckle's alleged contractual right against coordination.

Specifically, the 1990 Letter of Agreement states:

> [p]ursuant to Subsection 354(14) of the Michigan Workers Compensation Act, as amended, **until termination or earlier amendment of the 1990 Collective Bargaining Agreement**, workers compensation for employees shall not be reduced by disability retirement benefits payable under the Hourly-Rate Employes (*sic*) Pension Plan.

GM's Application, Exhibit 2. The limiting language in the 1990 Letter of Agreement (*i.e.* "until termination or earlier amendment") "expressly repudiates an intent that the right should vest, and the language itself was included in the same sentence regarding coordinated benefits." *Garbinski*

I, supra, at *4. Because Arbuckle lacked a vested right prohibiting the coordination of his workers' compensation payments with his disability benefits, the UAW was free to negotiate with GM to eliminate any contractual non-coordination benefits Arbuckle may have had.

GM did not, as Arbuckle misleadingly contends, act unilaterally when it negotiated the 2009 Letter of Agreement. *See* Arbuckle's Response, at p. 7. Rather, together, GM **and** the UAW negotiated the 2009 Letter of Agreement as part of collective bargaining to save GM from almost certain financial ruin. Arbuckle's mistaken expectation that he had a vested interest in lifetime non-coordinated workers' compensation benefits is not sufficient to sustain his claim.[5]

III. GM Did Not Have to Produce Any Evidence That Arbuckle Consented to the Modification of the 1990 Letter of Agreement Because the 1990 Letter of Agreement Expired by its Own Terms in 1993 – Tellingly, Arbuckle Fails to Address This Dispositive Issue in His Response.

In its Application, GM makes clear that the 1990 Letter of Agreement expired by its own terms as a matter of state contract law in 1993, such that the prohibition against coordinated benefits in the 1990 Letter of Agreement ceased. Accordingly, the default provisions of MCL 418.354, which mandate coordination of benefits, control and GM appropriately coordinated Arbuckle's workers' compensation benefits with his GM funded disability benefits. *See* GM's Application, at pp. 21-24. Yet, Arbuckle wholly (and tellingly) disregards this argument in his Response. As a result, this Court should deem any opposition by Arbuckle to this argument abandoned and, for that reason alone, either peremptorily vacate the Court of Appeals' Opinion or grant GM's Application. *See Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).[6]

[5] Because Arbuckle's disability pension plan benefits are vested, GM and the UAW **never** reduced their value through coordination or sought to amend GM's pension plan to affect Arbuckle's vested rights to his disability pension. *C.f.* Arbuckle's Response, at p. 32.

Instead of directly addressing GM's dispositive contractual expiration argument, Arbuckle attempts to complicate the straightforward contract issue by repeatedly referring to testimony about the continuity/status of GM's pension plan. *See* Arbuckle's Response, at pp. 6, 24 and 25. It appears Arbuckle (and the Court of Appeals) improperly link GM's pension plan to the finite contractual rights articulated in the 1990 Letter of Agreement. Yet, **the durational limiting language in the 1990 Letter of Agreement is tied to the expiration of the 1990 CBA, not the pension plan**. *See* GM's Application, at p. 6.

Apparently, the Court of Appeals and Arbuckle conflated GM's single continuous pension plan (subject to amendment) with the finite terms of each successive collective bargaining agreement between GM and the UAW. *See Id*. Whether GM has a single continuous pension plan or not has no relevance to the disposition of this case. All that matters is that the 1990 Letter of Agreement expired by its own terms in 1993, ending GM's contractual obligation not to coordinate workers' compensation benefits. The Court of Appeals clearly erred when it disregarded the clear and unambiguous terms of the 1990 Letter of Agreement and, instead, found the status of GM's pension plan dispositive or even relevant. *See* GM's Application, at pp. 6-7.

IV. GM Never Took the Position That it Can Disregard Michigan's Workers' Compensation Statute or That State Courts Cannot Adjudicate Pure Workers' Compensation Claims –In This Instance, §301 of the LMRA Wholly Preempts Arbuckle's Claims Arising Out of an Alleged Breach of the 1990 CBA.

Under no circumstances does GM argue that: (1) it does not have to abide by Michigan's Workers' compensation statute or (2) Michigan courts and administrative agencies lack

[6] The outcome of Arbuckle's failure to address GM's argument is similar to and should result in the same outcome as an appellant who fails to brief an issue on appeal and, thus, abandons the issue altogether. *See Steward, supra*, at 558 ("[P]laintiffs abandoned this issue by failing to brief it on appeal").

jurisdiction to adjudicate pure state law workers' compensation clams. Arbuckle's assertions to the contrary are false. *See* Arbuckle's Response, at pp. 18-19.

Instead, GM takes the well-founded position that Arbuckle's claims are predicated on a purported breach of a collective bargaining agreement (*i.e.* the 1990 CBA) and, therefore, jurisdiction to adjudicate such claims lies exclusively in the federal courts. *See* GM's Application, at pp. 11-15.

Pursuant to 29 USC §185(a):

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 USC §185(a). Critically:

> **[t]he Supreme Court has interpreted this language to require federal pre-emption** (*sic*) of state law-based actions because federal law envisions a national labor policy that would be disturbed by conflicting state interpretations of the same CBA. Pre-emption (*sic*) occurs when a decision on the state claim is inextricably intertwined with consideration of the terms of the labor contract and **when application of state law to a dispute requires the interpretation of a collective bargaining agreement.**

Jones v GM, 939 F 2d 380, 382 (CA 6 1991).

To determine whether §301 of the LMRA completely preempts a plaintiff's state law claim (such as Arbuckle's workers' compensation claim), the Sixth Circuit utilizes a two-step test. Specifically:

> [f]irst, we examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, we ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right both arises from state law and does not require contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, §301 preemption is warranted.

Alongi v Ford Motor Co, 386 F 3d 716, 724 (2004).

Under the two-part test set forth in *Alongi* (a case cited in Arbuckle's Response), *supra*, Arbuckle's claim that GM improperly coordinated his workers' compensation benefits with his GM funded disability pension benefits is wholly preempted by §301 of the LMRA. Federal preemption is mandated because the contractual right against benefit coordination, upon which Arbuckle relies, is created, if at all, by the 1990 CBA, **not** state law. Thus, Arbuckle cannot demonstrate that his alleged right to contractual non-coordination of benefits **both** arises from state law (*i.e.* MCL 418.354(14)) **and** does not require interpretation of the 1990 CBA.[7] *See Garbinski I, supra*, at *8.

While time and again Arbuckle insists that his claim is founded only upon state law, in reality, and as recognized by Magistrate Kenneth Birch of the Workers' Compensation Board of Magistrates, whose opinion Arbuckle seeks to reinstate:

> [Arbuckle had a contract at the time of his retirement which prohibited the coordination of disability pension benefits and **he brought this action to enforce the provisions of that contract his representative negotiated in 1990.**[8]

GM's Application, Exhibit 7.

Given this determination by Magistrate Birch, the only appropriate finding is that Arbuckle's claim "rises or falls" based upon a court's interpretation of the 1990 CBA (*i.e.* the contract Arbuckle's representative negotiated in 1990). Accordingly, the Court of Appeals lacked subject matter jurisdiction to render its Opinion. Certainly, the Court of Appeals lacked subject matter jurisdiction to rule on the scope of a union's ability to bargain on behalf of its

[7] Contractual interpretation of the 1990 CBA is necessary to adjudicate this matter because absent the language of the 1990 Letter of Agreement, Michigan law mandates coordination of workers' compensation benefits, unless the union and employer otherwise bargain away the right to coordinate. *See Smitter, supra*, at p. 125. As discussed, *infra*, the 1990 Letter of Agreement, upon which Arbuckle relies to establish the prohibition against coordination of his workers' compensation benefits, is an integral part of the 1990 CBA.

[8] While GM disagrees with Magistrate Birch's ultimate determination concerning the ability of GM to coordinate benefits, it does agree with this particular finding.

retirees, which undeniably constitutes an exclusive federal question. As such, this Court should vacate any ruling in the Court of Appeals' Opinion concerning the right of a union to bargain collectively on behalf of its retirees with respect to non-vested benefits.

Arbuckle's dependence on Judge O'Meara's untested Opinion in *Savage v GM* is misplaced. Critically, the *Savage* opinion **did not** address the right of a union to bargain on behalf of its retirees. Moreover, as Arbuckle's Response freely concedes, *Savage* has no preclusive effect.[9] Furthermore, Arbuckle's Response fails to acknowledge the significance of the more recent *Garbinski I, supra*, in which on facts substantially identical to those here, Judge Gerald Rosen found that federal law preempts Michigan law concerning collective bargaining and that that the UAW could bargain on behalf of its retirees. *See Garbinski I, supra*. Notably, in *Garbinski II, supra*, the Sixth Circuit affirmed Judge Rosen's ruling heightening its persuasive value. *See* GM's Application, at Exhibit 10.

CONCLUSION

This Court should peremptorily reverse the Court of Appeals' Opinion or, alternatively, grant GM's Application to correct the Court of Appeals' clear errors to preclude future litigants from leveraging the Court of Appeals' erroneous decision in subsequent actions.

Respectfully submitted,

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[9] Additionally, *Caterpillar, Inc v Williams*, 482 US 386, 107 S Ct 2425, 96 L Ed 2d 318 (1987), the primary case buttressing Judge O'Mera's Opinion in *Savage*, does not apply to the facts of this case. *See* GM's Application, at pp. 14-15.

PROOF OF SERVICE

The undersigned states that on May 18, 2015, he served copies of *Defendant-Appellant's General Motors LLC's Reply in Support of Application for Leave to Appeal* and this *Proof of Service* via electronic and U.S. mail upon Robert J. MacDonald at lawyers@disabledworker.net.

s/Gregory M. Krause
Gregory M. Krause

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